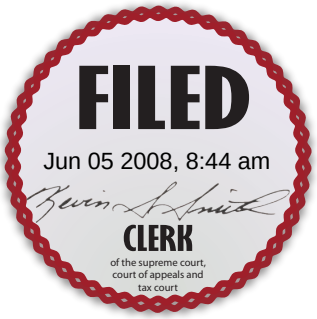

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IN THE
COURT OF APPEALS OF INDIANA

STEVEN MAYBERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0708-CR-487
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
Cause No. 49G02-0604-MR-64312

June 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Steven Mayberry appeals his conviction and sentence for voluntary manslaughter, as a class A felony.[1]

We affirm.

ISSUES

1. Whether the trial court abused its discretion in excluding evidence.

2. Whether the evidence was sufficient to rebut Mayberry's self-defense claim.

3. Whether the evidence was sufficient to support Mayberry's conviction.

4. Whether Mayberry's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

Melissa Calvert met Keith Bogay in December of 2001, when they both lived in Missouri. Calvert became pregnant with their child in 2004. In November of 2004, Calvert moved to 1028 West Udell Street in Indianapolis.

Calvert met Mayberry in November of 2005, and the two started a relationship. Calvert had informed Mayberry that "she was in an abusive relationship with [Bogay]." (Tr. 649). Calvert told Mayberry that Bogay had pulled a knife on Bogay's cousin. Calvert also told Mayberry about an incident where Bogay "had flipped out," (Tr. 649), and cut his fingers with a knife; after the police and ambulance personnel responded, Bogay allegedly "got into an altercation with the police . . . ." (Tr. 650). That incident

[1] Ind. Code § 35-42-1-3.

led to the arrest of both Bogay and Calvert. Calvert informed Mayberry that that incident resulted in Bogay being hospitalized and diagnosed with bipolar disorder.

In late March or early April of 2006, Calvert and Mayberry got into an argument regarding Mayberry's relationship with another woman. "[A] week or a few days" after the argument with Mayberry, Calvert traveled to St. Louis, Missouri with her friend, Kari Durham. (Tr. 244). Calvert met Bogay in St. Louis; Bogay then drove back to Indianapolis with Calvert and Durham, arriving in Indianapolis on April 5, 2006.

On April 6, 2006, Bogay and Calvert began arguing after Bogay discovered a pregnancy test in Calvert's vehicle. Later that evening, Bogay, Durham and Calvert went to Calvert's residence on Udell Street, where the three smoked marijuana and Bogay drank some alcohol. Durham left the residence later that evening.

Bogay and Calvert continued to argue into the early morning of April 7th. Bogay became physical with Calvert, choking and kicking her. When Calvert attempted to leave the residence, Bogay initially prevented her from doing so. Calvert eventually got her children into her car and left.

After Calvert left her residence, Calvert telephoned Mayberry and told him what had happened between her and Bogay. Mayberry told Calvert to come to the home of his grandmother, Nancy Cobb, but Calvert refused because "[s]he was worried about her belongings, her things." (Tr. 658). Mayberry eventually agreed to meet Calvert at a gas station. Calvert drove to the gas station with her two children, where she waited for Mayberry. Mayberry arrived in a green Taurus, driven by Mayberry's mother, Celeste Cobb. Devin George, a friend of Mayberry, also was in the Taurus.

At approximately 2:00 a.m. on April 7, 2006, Indianapolis Metropolitan Police Officer Marlin Sechrist was sitting in his police vehicle at a gas station located at 2910 Dr. Martin Luther King, Jr. Street. Officer Sechrist's vehicle was parked next to Sergeant Michael Bruin's police vehicle. As the officers discussed that night's police runs, they observed a blue Chevy Cavalier vehicle with Missouri license plates pull into the gas station. The vehicle "was sitting kind of by itself and the lights were on and it appeared to be running." (Tr. 120). Sergeant Bruin also noticed that a green Taurus "had pulled up near . . . one of the gas pumps . . . ." (Tr. 122). Sergeant Bruin approached the Cavalier to determine whether the driver was lost or needed assistance. As Sergeant Bruin approached the Cavalier, the Taurus left the gas station.

Sergeant Bruin observed "a young white female," later identified as Calvert, in the driver's seat of the Cavalier and two small children in the backseat. (Tr. 122). Sergeant Bruin asked Calvert whether she was "okay," to which she responded she was. (Tr. 123). Calvert then pointed to the green Taurus, which by this time "was stopped at the exit to the gas station," and said she "was just waiting for them" because she was "going to follow them back somewhere." (Tr. 123). Sergeant Bruin then left the gas station as did Calvert. After Sergeant Bruin left the gas station, he passed the Taurus and Cavalier as the drivers waited for the light to change at 29th Street.

Calvert followed Cobb to Udell Street, where both drivers parked. Cobb then got into Calvert's vehicle, while Mayberry and George entered Calvert's residence. Mayberry discovered Bogay in one of the upstairs bedrooms; Bogay was lying down on the floor. Mayberry told Bogay that he would have to leave. After Bogay resisted,

Mayberry began punching Bogay. Subsequently, Mayberry pushed Bogay down the stairs and out of the residence. Mayberry and Bogay continued "tussling" and arguing as they exited the house. (Tr. 273). Mayberry then pushed the then-naked Bogay off of the porch. Mayberry then punched and kicked Bogay, after which Bogay fell to the ground.

After Bogay fell down to the ground, Mayberry asked Cobb to get a glass of water from the house, which she did. Mayberry then poured the water on Bogay, who "gargled a little bit" and had "blood coming from his mouth." (Tr. 628). Bogay then arose and "stumbl[ed]" approximately fifteen yards down the street. (Tr. 628). Mayberry and Cobb then got into the Taurus while George "ran down the street following [Bogay]." (Tr. 631). Cobb then heard, "pop, pop." (Tr. 631). Subsequently, George got into the Taurus.

Calvert then drove away from the area, with Cobb, Mayberry and George following. Prior to going back to Nancy Cobb's residence, George told Cobb to stop at Municipal Gardens, which she did. George got out of the vehicle but returned shortly thereafter.

After George returned to Nancy Cobb's residence, Nancy Cobb overheard George bragging about shooting someone in the groin. George also stated to his cousin, "'I killed him, cuz.'" (Tr. 613).

During the early morning of April 7th, Pamela Moore was in her upstairs bedroom, which faced Udell Street, when she heard "[t]wo very, very loud gunshots[.]" (Tr. 70). The gunshots sounded as if they were "[r]ight outside the window." (Tr. 70). Moore also heard "a male voice say 'Go man go.'" (Tr. 70). Moore then heard "a car

skid off," with its tires "shr[i]ek[ing] as it took off." (Tr. 71). When Moore looked out of her window, she observed a "dark car" driving toward Clifton Street. (Tr. 72). Moore also observed "something brown in the grass." (Tr. 73). Moore ran downstairs to further investigate.

Hearing moaning when she opened the front door, Moore went to telephone 911. Moore's grandmother, however, already had telephoned 911. As Moore was speaking with the operator, she went to the front porch and observed a black man, lying next door in the grassy area "between the sidewalk and the street . . . ." (Tr. 74). The man was not wearing any clothes.

While still at the gas station and approximately twenty minutes after Sergeant Bruin approached the Cavalier to speak with the driver, Officer Sechrist received a call from police dispatch, reporting shots fired in the 1000 block of West Udell Street. At the scene, Officer Sechrist observed Bogay lying on his back in the grass. Bogay was unresponsive and appeared to have a gunshot wound to "the gut . . . ." (Tr. 97). Soon thereafter, an ambulance arrived and transported Bogay to the hospital, where he subsequently died.

Harry Liggett, a crime scene specialist with the Indianapolis Marion County Forensic Services Agency (the "Crime Lab") arrived at the scene at approximately 3:00 a.m. Liggett collected evidence at the scene, including two spent .25 caliber shell casings. Officers, however, never recovered a .25 caliber gun.

Officer Sechrist remained at the scene until detectives arrived. At approximately 4:30 a.m., Officer Sechrist and Sergeant Bruin received another dispatch, requesting them

to proceed to 1028 West Udell Street to assist the detectives with a possible crime scene. During a canvass of the neighborhood, detectives "had located a residence with a lot of blood at the front of the residence . . . ." (Tr. 100). The detectives believed there to be a second victim in the residence but did not receive a response to their knocks. The detectives therefore requested uniformed police officers "to make a forced entry on the location to look for a possible other victim." (Tr. 100).

After gaining entry into the residence, Officer Sechrist observed a bloody sock on the stairs leading to the second floor. Officer Sechrist also observed "a lot of blood and bloody clothing on the floor" inside one of the rooms. (Tr. 102). Melissa Wilson, a crime scene specialist with the Crime Lab, collected several items of bloody clothing—including socks, a jersey, a sweatshirt and a coat—from the house.

When Sergeant Bruin entered the residence, he observed "a bunch of snapshots" just off of the kitchen area. (Tr. 130). Sergeant Bruin noticed that pictures of the woman who had been driving the Cavalier, and with whom he had spoken, were displayed among the photographs. Sergeant Bruin informed the detectives about his earlier encounter with the woman, including "that she left following another car and they had gone in the direction of Udell from the gas station." (Tr. 132).

An autopsy conducted on April 9, 2006, revealed that Bogay had "gunshot wounds to his body on the left side, lower side of the abdomen. And he had blunt trauma to his . . . head and ne[ck] region." (Tr. 404). One bullet "went into the left side of the abdomen and it went slightly upward into the body going through the intestines and damaging the vessel," (Tr. 406), ultimately becoming "lodged on the side of the lumbar vertebrae[.]"

(Tr. 406). The second bullet entered the "flank area," went "slightly upwards and . . . into the cavity and lodged one side of the . . . body." (Tr. 407). The bullet wound to Bogay's abdomen was consistent with a bullet being shot "straight into the body, or perpendicular," whereas the second bullet wound was consistent with a bullet being shot "at an angle and not perpendicular." (Tr. 423).

In addition to abrasions to his right ankle, toes, knee, and body, Bogay had "tears to his lips[,] . . . abrasions on his facial skin and he had multiple areas of bruising on his scalp." (Tr. 410). The autopsy revealed hemorrhaging of the brain, caused by "a minimal [sic] of four blows to the head[.]" (Tr. 430). According to Dr. Joye Carter, the chief forensic pathologist for the Marion County Coroner's Office, the injuries to Bogay's head were "inconsistent with a fall." (Tr. 433). The hemorrhages led to "[b]rain swelling, or edema of the brain," (Tr. 433), which caused a direct hemorrhage "in the center of the brain stem . . . ." (Tr. 434). According to Dr. Carter, "[t]he direct hemorrhage came from the blunt trauma to the head resulting in [s]welling of the brain, leading to the irreversible change and swelling of the brain stem . . . ." (Tr. 435). Dr. Carter opined that the gunshot wounds and blunt force injuries to the head caused Bogay's death. Dr. Carter further opined that the injuries to Bogay's brain alone could have caused his death.

On April 7, 2006, Detective Kevin Duly of the Indianapolis Metropolitan Police Department interviewed Mayberry. Mayberry admitted to beating Bogay but denied shooting him. Mayberry failed to mention during the interview that he had gone to Calvert's residence with George.

On April 11, 2006, the State charged Mayberry with murder, a felony.[2] Specifically, the State charged that Mayberry "did knowingly kill" Bogay "by shooting a deadly weapon; that is a handgun and/or beating with fists and kicking in the head . . . the person of . . . Bogay, thereby . . . causing Bogay to die[.]" (App. 37). The State also charged Mayberry with carrying a handgun without a license.[3]

On April 24, 2006, Mayberry filed a notice of defense of justifiable reasonable force. Prior to trial, the State filed a motion to dismiss the charge of carrying a handgun without a license, which the trial court granted.

A three-day jury trial commenced on May 21, 2007. The jury found Mayberry guilty of the lesser-included offense of voluntary manslaughter, as a class A felony.

The trial court ordered a pre-sentence investigation report (the "PSI") and conducted a sentencing hearing on July 25, 2007. The trial court found Mayberry's remorse and that imprisonment would impose a hardship on Mayberry's dependents to be mitigating circumstances. The trial court found Mayberry's criminal history to be an aggravating circumstance, "although not strongly aggravating . . . ." (Tr. 960). The trial court, however, found "as very aggravating . . . the fact that [Mayberry] had been released on two separate cases at the time that he committed" the present offense. (Tr. 960). Finally, the trial court found the nature and circumstances of the case to be an aggravating circumstance, stating as follows:

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[2] I.C. § 35-42-1-1.

[3] I.C. § 35-47-2-1.

> I, like the State and like the jury in this case, have a difficult time trying to figure out how Mr. Bogay's clothes were not on. And that is significant in this case, because as the State argued at trial, that his clothes were not on because their inference was . . . that he was being held at gunpoint and quite honestly I think was the reasonable explanation that the jury found. But regardless of that, to me when you just look at the severe nature of the beating in this case and the numerous punches to the head . . . . So the Court believes that the nature of circumstances and the fact that he did it all in front of his girlfriend, the son of the victim in this case, and his own mother, none of whom thought about calling the police, just makes no sense to me. And so the Court believes that that's very aggravating . . . .

(Tr. 961). Finding that the aggravators outweighed the mitigators, the trial court sentenced Mayberry to fifty years in the Department of Correction.

Additional facts will be provided as necessary.

DECISION

1. Exclusion of Evidence

Mayberry asserts that the trial court abused its discretion when it excluded from evidence portions of "a medical report which showed Bogay cut his fingers and then became involved in an altercation once the police arrived . . . ." Mayberry's Br. 15.

> We note that the admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the appellant's favor. As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact.

Redding v. State, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (internal citations omitted), *reh'g denied*.

In this case, Mayberry sought to admit into evidence certain portions of Bogay's medical reports, i.e., the police report regarding the incident leading to Bogay's hospitalization and diagnosis of bipolar disorder, because "[t]he excluded medical reports gave much more vivid, accurate and most importantly, relevant and probative detail regarding what Mayberry knew and therefore were corroborative of Mayberry's" claim of self-defense. Mayberry's Br. 16. The trial court, however, only allowed the admission of Bogay's discharge report, diagnosing Bogay with bipolar disorder.

The self-defense statute in force at the time of the offense charged states, in relevant part, as follows: "[A] person is justified in using deadly force only if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony." I.C. § 35-41-3-2(a) (2006). "[T]he phrase 'reasonably believes' . . . requires both subjective belief that force was necessary to prevent serious bodily injury, and that such actual belief was one that a reasonable person would have under the circumstances." *Littler v. State*, 871 N.E.2d 276, 279 (Ind. 2007).

> [E]vidence of the victim's character may be admitted to show that the victim had a violent character giving the defendant reason to fear him. The victim's reputation for violence is pertinent to a claim of self-defense. Thus, the victim's reputed character, propensity for violence, prior threats and acts, <u>if known by the defendant</u>, may be relevant to the issue of whether a defendant had fear of the victim prior to utilizing deadly force against him. Therefore, a defendant is entitled to support his claim of self-defense by introducing evidence of matters that would make his fear of the victim reasonable.
>
> * * *

> Although the victims threats or violence need not be directed toward the defendant, the defendant must have knowledge of these matters at the time of the fatal confrontation between the victim and the defendant.

Brand v. State, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002) (emphasis added), *trans. denied*.

At trial, Mayberry's counsel made an offer of proof that Calvert had told Mayberry "that she had forced [Bogay] to go to the hospital because he had pulled a knife out on her and Kari [Durham]," (Tr. 551); it took "either two or three police officers to restrain" Bogay; and the police officers "maced [Bogay] . . . ." (Tr. 554). In addition, defense counsel offered that Calvert informed Mayberry that "the doctor had diagnosed [Bogay's] actions . . . as being bipolar." (Tr. 553).

Mayberry testified during trial that Calvert had told him that while living in St. Louis, Bogay "had flipped out and [Calvert] had called the police because [Bogay] . . . had a knife and he had cut . . . his fingertips off[.]" (Tr. 649-40). Mayberry further testified that Calvert told him that after the police arrived, Bogay "had got into altercation with the police . . . ." (Tr. 650). Calvert confirmed that she had informed Mayberry of that particular incident, including that "it took three cops to subdue" Bogay. (Tr. 747-48).

It is not evident from the testimony that Mayberry knew of the medical report containing the police report or had specific knowledge of the information contained therein. Thus, we cannot say the trial court abused its discretion in excluding Mayberry's proffered evidence.

Furthermore, the jury heard testimony from Calvert that Bogay had had an altercation with police officers and later was hospitalized. The jury also heard testimony that Bogay subsequently was diagnosed with a mental disorder. Thus, the evidence excluded would have been merely cumulative, the exclusion of which, even if improper, was harmless. *See Miller v. State*, 720 N.E.2d 696, 705 (Ind. 1999); *Sylvester v. State*, 698 N.E.2d 1126, 1130 (Ind. 1998) ("Where the wrongfully excluded testimony is merely cumulative of other evidence presented, its exclusion is harmless error.").[4]

2. Self-Defense

Mayberry contends that the State failed to disprove his claim of self-defense. We disagree.

Indiana Code section 35-42-1-3 provides that a person who knowingly or intentionally kills another human being "while acting under sudden heat" commits voluntary manslaughter. The offense is a class A felony if it is committed "by means of a deadly weapon." I.C. § 35-42-1-3.

As to self-defense, Indiana Code section 35-41-3-2(a) provides that "[a] person is justified in using reasonable force against another person to protect the person or a third

[4] We note that Mayberry cites to *Littler v. State*, 871 N.E.2d 276 (Ind. 2007) in support of his contention that the trial court improperly excluded the medical/police reports because the reports would have "corroborate[d] Mayberry's assertion that he believed he would need to use force against Bogay." Mayberry's Br. 16. We, however, find *Littler* to be distinguishable from this case as Littler sought to introduce "first-hand confirmation of facts" alleged to be foundational to Littler's fear of the victim. 871 N.E.2d at 279. Here, the medical/police reports would not have confirmed what Calvert had told Mayberry regarding Bogay's demeanor; therefore, the reports would not have confirmed what Mayberry believed to be true. Rather, Calvert's testimony confirmed what she had told Mayberry about Bogay.

person from what the person reasonably believes to be the imminent use of unlawful force."

> For a claim of self-defense to prevail, the defendant must show that he (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm.

Wilcher v. State, 771 N.E.2d 113, 116 (Ind. Ct. App. 2002), *trans. denied*. The State bears the burden of disproving one of the elements of self-defense once a defendant asserts such a claim. *Id.* "The State may rebut a claim of self-defense by affirmatively showing that the defendant did not act to defend himself or another by relying on the evidence elicited in the case-in-chief." *Id.*

We review a challenge to the sufficiency of evidence to rebut a claim of self-defense as we would any sufficiency of the evidence challenge. *Rodriguez v. State*, 714 N.E.2d 667, 670 (Ind. Ct. App. 1999), *trans. denied*. We neither reweigh the evidence nor judge the credibility of witnesses. *Id.* We examine only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom, and, if there is substantial evidence of probative value to support the conviction, it will not be set aside. *Id.*

In this case, Mayberry had ample opportunity to get assistance from police officers in removing Bogay from Calvert's residence; instead, he chose to confront Bogay. Furthermore, during an interview with police—an audiotape of which was admitted into evidence—Mayberry stated that when he first entered the house, he "was in fear of [his] life." (App. 128). When Mayberry encountered Bogay, however, Bogay "was asleep,"

prompting Mayberry to "nudge[]" him awake. (Tr. 663). Mayberry also observed that Bogay was "naked"; (Ex. Vol. II at 128) Mayberry therefore was "cool" because he knew that Bogay did not have any weapons and because Mayberry had taken "five years in boxing class . . . ." (Ex. Vol. II at 129). Given the preceding evidence, the State sufficiently negated Mayberry's claim that he had a reasonable fear of great bodily harm or death. *See Geralds v. State*, 647 N.E.2d 369, 373 (Ind. Ct. App. 1995) (finding that the defendant confronting the perpetrator where the defendant had ample opportunity to call the police contradicted his claim of fear), *trans. denied*.

3. Sufficiency of the Evidence

Mayberry asserts the evidence was insufficient to support his conviction for voluntary manslaughter. Specifically, Mayberry contends that he did not "knowingly" kill Bogay. Mayberry's Br. 11.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

To prove the offense of voluntary manslaughter, the State was required to show that Mayberry knowingly killed Bogay while acting under sudden heat. I.C. § 35-42-1-3.

"A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." I.C. § 35-41-2-2(b). A knowing killing may be inferred from a person's use of a deadly weapon in a way that is likely to cause death. *Barker v. State*, 695 N.E.2d 925, 931 (Ind. 1998), *reh'g denied*.

Regarding accomplice liability, Indiana Code section 35-41-2-4 provides that "[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense . . . ." "'[A]n accomplice is criminally responsible for all acts committed by a confederate which are a probable and natural consequence' of their concerted action." *McGee v. State*, 699 N.E.2d 264, 265 (Ind. 1998). It is not necessary that a defendant participate in every element of a crime to be convicted of that crime under a theory of accomplice liability. *Bruno v. State*, 774 N.E.2d 880, 882 (Ind. 2002).

> In determining whether there was sufficient evidence for purposes of accomplice liability, we consider such factors as: (1) presence at the scene of the crime; (2) companionship with another at the scene of the crime; (3) failure to oppose commission of crime; and (4) course of conduct before, during, and after occurrence of crime.

Id. Although they may be considered as evidence of accomplice liability, mere presence at the scene and failure to oppose the commission of the crime are insufficient to support a conviction under such a theory. *Turner v. State*, 755 N.E.2d 194, 198 (Ind. Ct. App. 2001), *trans. denied*. Instead, evidence must exist of "the defendant's affirmative conduct, either in the form of acts or words, from which an inference of common design or purpose to effect the commission of a crime may be reasonably drawn." *Id.*

In the present case, the evidence shows that after Mayberry received the telephone call from Calvert, he left his grandmother's residence with George. Mayberry and

George then proceeded to Calvert's residence, where Mayberry intended to confront Bogay. Mayberry then brutally beat Bogay, rendering Bogay incapacitated; George then shot Bogay as Bogay lay on the ground. Finally, the State presented evidence that Mayberry initially concealed from police George's involvement.

While Mayberry did not shoot Bogay, the evidence shows that he and George acted together to attack Bogay. The evidence also establishes that Bogay's death resulted from both the beating and shooting. A reasonable trier of fact could have found that Mayberry acted with the required intent and that he was an accomplice to the killing of Bogay with a deadly weapon. *See McGee*, 699 N.E.2d at 266.

4. Inappropriate Sentence

Mayberry asserts that his sentence of fifty years is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class A felony

is thirty years with a potential maximum sentence of fifty years. I.C. § 35-50-2-4.[5] Here, the trial court sentenced Mayberry to the maximum sentence.

Regarding the nature of the offense, the record reflects that Calvert sought assistance from Mayberry in getting Bogay to leave Calvert's residence. Rather than seeking the assistance of law enforcement, Mayberry went to Calvert's residence to confront Bogay. Once at Calvert's residence, Mayberry discovered a sleeping Bogay. Mayberry confronted Bogay, engaging Bogay in a fight. Mayberry, who had taken boxing lessons, proceeded to punch Bogay several times in the head. Even after Mayberry accomplished his task of getting Bogay out of the residence, he continued to beat Bogay. Mayberry brutally kicked Bogay in front of two small children, including Bogay's own son. The beating sustained by Bogay was so severe that it alone would have caused Bogay's death. Finally, the beating ended with George shooting Bogay as Bogay lay on the ground.

Regarding Mayberry's character, the record reflects that Mayberry had a prior conviction for attempted robbery in 1997, and had been adjudicated a juvenile delinquent for disorderly conduct in 1993. Furthermore, Mayberry's PSI reveals a long history of arrests, with Mayberry's first adjudication at the age of ten years. Charges against Mayberry included criminal confinement, criminal recklessness, battery, and domestic battery; those charges, however, were dismissed due to a witness failing to appear.

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[5] Indiana's new advisory sentencing scheme, which went into effect on April 25, 2005, applies in this case. Pursuant to Indiana Code section 35-50-2-4, "[a] person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years."

Moreover, at the time of the instant offense, Mayberry had been charged with several counts of possession of a controlled substance and was awaiting trial.

> [A] record of arrest, particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State. Such information may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime.

Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005) (citations omitted). Based on the above, we conclude that the sentence imposed by the trial court was not inappropriate.

Affirmed.

NAJAM, J., and BROWN, J., concur.